STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
SAWYER, P.J., and JANSEN and GAGE, J.J.
OAKLAND CIRCUIT COURT, HON. ALICE L. GILBERT, Presiding

EILEEN V. GRAVES,

Plaintiff-Appellant,

vs.

AMERICAN ACCEPTANCE MORTGAGE CORPORATION and BOULDER ESCROW, INC.,

Defendants-Appellees,

and

BOULDER ESCROW, INC., a Nevada corporation,

Defendant-Appellee/Counter and Cross-Plaintiff,

vs.

STEVE A. DIAZ,

Defendant/Counter and Cross-Defendant.

/

Supreme Court Docket No. 119977

Michigan COA Docket No. 215141

Oakland County Circuit Court
Case No. 96-511648-CZ

REPLY BRIEF ON APPEAL - APPELLANT EILEEN V. GRAVES

May 27, 2003

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INTRODUCTION

The material facts of this case presented in Appellant's Brief on Appeal are not in dispute. Both Defendants-Appellees' ("Appellees") and the Michigan Land Title Association's ("MLTA") briefs are replete with character attacks and inference and innuendo regarding Eileen Graves' purported motivations and real estate expertise. Such conjecture and speculation must be rejected by this Court as irrelevant and unrelated to the application of the Michigan recording statutes.

ARGUMENT

I. APPELLEES ACKNOWLEDGE THE PRIORITY OF GRAVES' LIEN UNDER THE MICHIGAN RECORDING STATUTES.

Appellees argue that they are the holders of "a purchase money mortgage and Graves simply holds a prior recorded lien in a different estate in land." (Def.-App. Brief p.15). Appellees argue that "even if Graves' lien had been recorded timely and it was discoverable, and American Acceptance proceeded to close with Diaz, American Acceptance would still prevail in this case" for the reason that American Acceptance possessed a purchase money mortgage. (Def.-App. Brief p. 31). However, Appellees completely undermine their own argument by asserting that "if American Acceptance knew about Graves' lien, **it would not have made the loan to Diaz.**" (Def.-App. Brief, pp. 13, 14, emphasis added). These diverging positions obviously reveal that American Acceptance has always recognized that Graves' lien was entitled to priority over its mortgage. Calling its land contract payoff a "purchase money mortgage" entitled to trump the pre-existing Graves lien, is no more than an attempt at post transaction creative lawyering which this Court should not entertain. Appellees' position in this regard is not consistent with Michigan law governing such recording priorities and the above admission confirms that all parties hereto recognize this.

II. APPELLEES COMPLETELY MISCONSTRUE THE DOCTRINE OF EQUITABLE CONVERSION.

Appellees claim that Graves and the Real Property Law Section argue that, "immediately upon execution of the land contract, the vendor's estate in land has converted from an estate in land to a mortgage, with the legal title securing the debt under the contract." (Def.-App. Brief, p. 7). Nowhere does Graves make such argument. Rather, Graves refers this Court to the doctrine of equitable conversion wherein a vendee's interest under a land contract becomes realty. Charter Twp. of Pittsfield v City of Saline, 103 Mich App 99, 103; 302 NW2d 608 (1981). This is significant because an interest in real property can be mortgaged or encumbered. The priorities of these encumbrances are governed by Michigan's race-notice statutory recording scheme.

As a land contract vendee, Diaz had already "purchased" the property at issue. It is this recognition in Michigan law of the real property rights of the vendee who purchases property pursuant to a land contract, that removes a subsequent mortgage loan used to pay off the balance of the land contract from the realm of purchase money mortgage status.

While the land contract vendor's interest does not convert to a mortgage per se, the practical treatment of land contract financing is similar to that of a mortgage.[1] Since, in the context of a payoff of a land contract, the property was already purchased at the execution of the land contract, the public policy supporting the priority of a purchase money mortgage is not applicable. To argue otherwise ignores the plain and practical use of land contracts and would effectively undermine the Land Contract Mortgage Act as no lender would provide a loan to a land contract vendee knowing

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[1] The purported differences between vendor and mortgagee status cited by Appellees are not relevant to the policies supporting purchase money mortgage status.

that its mortgage will be automatically subordinated if the vendee later obtains a second loan to pay off the land contract balance.

III. GRAVES' LIEN WAS RECORDED IN ACCORDANCE WITH MICHIGAN LAW.

The cases cited by Appellees and MLTA in support of the proposition that "Graves bears the risk of adverse effects caused by the delay in indexing her lien" are inapposite and factually distinguishable.[2] In this instance, there is no "error" or "mistake," despite the efforts of Appellees and MLTA in portraying such. Eileen Graves simply recorded her judgment lien in the Oakland County Register of Deeds.

To the extent Appellees and MLTA suggest that there was a "delay" in the indexing of the lien by the Oakland County Register of Deeds resulting in a gap in which the lien was not discoverable by examiners after its recording, attempting to attribute such delay to Graves is both contrary to logic and current Michigan law.[3] The Oakland County Register of Deeds considers a

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[2] Heim v Ellis, 49 Mich 241; 13 NW 582 (1882) (this case actually stands for the proposition that the notice implied from a statutory record is not defeated by the careless loss or accidental destruction after the document was duly filed); Gordon v Constantine Hydrolic Co., 117 Mich 620; 76 NW 142 (1898) (a lease containing a mortgage clause was left with the county register and recorded in a book of miscellaneous records indexed as a deed and not a mortgage due to failure of document to clearly identify the mortgage); Grand Rapids National Bank v Ford, 143 Mich 402; 107 NW 76 (1906) (a deed absolute in form, but intended as a mortgage, recorded in the books of records for deeds instead of for mortgages); Galpin v Abbott, 6 Mich 17 (1858) (a deed acknowledged and witnessed outside of the territory it was to be recorded in must nonetheless be executed and witnessed in the same manner that deeds within the territory to be recorded in would require and a noncomplying deed is not entitled to be of record in the first instance); Barnard v Campeau, 29 Mich 162 (1874) (notice of levy filed by sheriff contained wrong description of land to be levied upon); Barrows v Baughman, 9 Mich 213 (1861) (incorrect description of land contained in filed mortgage); Allen v Bay County Road Commission, 10 Mich App 731; 160 NW2d 346 (1968) (easement recorded in drain commissioner's office and not in the register of deeds).

[3] This also applies to Appellees' and MLTA's complaint regarding the Oakland County Register of Deeds' failure to utilize an entry book.

document recorded when it "passes the cash register" and the filing fee is paid and the document is time-stamped as recorded.[4] Graves' lien is clearly noted as "recorded" by the Oakland County Register of Deeds on September 7, 1994. If the recorded lien was not discoverable from that point forward, such a result is no fault of Graves. In Central Ceiling & Partition v Department of Commerce, 249 Mich App 438; 642 NW2d 397 (2002) (leave to appeal granted March 26, 2003), the Court of Appeals gave its analysis of the recording requirement of the Construction Lien Act:

> Of the six liens at issue, all were timely filed and accepted . . . . Unfortunately, the claims of lien were not formally recorded with the register of deeds office for more than thirty days after they were filed and accepted . . . . Attributing the delays within the register of deeds office to the subcontractors, as suggested by defendant, would lead to absurd and unfair results. No lien claimant would ever know the number of days that would be 'deducted' from the statutorily prescribed ninety day period because the lag time between the filing and acceptance, and formal recording, would vary case by case.
> *Id.* at 443-444.

The decision in Central Ceiling makes sense not only from the standpoint of the uncertainty that a contrary ruling would cause, but also from a logical analysis of who has the ability to control the manner in which the Oakland County Register of Deeds conducts business. In Cipriano v Tocco, 772 F Supp 344 (ED Mich 1991), the Court made the following pertinent comment concerning another recording statute (MCL 565.105) at issue in that case:

> Absent any evidence that the Ciprianos should have - or could have - controlled the way the Oakland County Register of Deeds records and indexes documents that are otherwise accepted for recording, the Court will not imply such a duty on the Ciprianos' part.
> *Id.* at 348-349.

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[4] Telephone interview with Larry Mitchell, Chief Deputy Register of Deeds, Oakland County Register of Deeds (May 20, 2003).

Clearly, Graves has no control over the manner in which the Oakland County Register of Deeds does business. The recording statutes require that she file her lien with the appropriate register of deeds office. She did so. MCL 565.25.

IV. APPELLEES WERE ON NOTICE OF GRAVES' LIEN.

Appellees and MLTA lament that Graves' lien could not have been discovered prior to the closing on the Diaz mortgage because it was filed during the "gap period".[5] The briefs of Appellees and MLTA are filled with shameful speculation, inference and innuendo that needlessly assault the character of Eileen Graves suggesting she contrived her filing to prevent notice to Appellees. Appellees' Brief is filled with words such as "purposeful", "duplicitous" and "subversion" to describe the actions of a divorced mother of four attempting to protect her rights to child support arrearages while using the terms "unwitting" and "innocent" to describe commercial entities whose very nature of business is searching title records and making loans against interests in properties for profit. Appellees' and MLTA's irrelevant name calling rather than focus on the relevant facts and law in the State of Michigan should not be indulged.

MLTA notes the rule of inquiry in Michigan is well settled:

> **A person is chargeable with constructive notice, where, having the means of knowledge, he does not use them.** If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, and does not make, but on the contrary studiously avoids making, such obvious inquiries, he

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[5] Graves presented her lien for recording in the Oakland County Register Deeds on September 7, 1994. Both Appellees and MLTA repeat that Graves filed her lien "on the day of closing" yet this appears to be unclear from even their own briefs. On page 2 of its brief, MLTA states that the Diaz mortgage loan was closed on September 7, 1994, but on page 3 acknowledges that the warranty deed from the land contract vendors was executed and delivered on September 13, 1994, the same date that Diaz signed and completed his Owner's Affidavit. Appellees likewise suggest that the judgment lien was filed on the morning of closing (Def.-App. Brief, pp. 2, 31, 41) and yet also state that Diaz executed his Owner's Affidavit at closing which did not occur until September 13, 1994 (Def.-App. Brief, p. 34). In any event, what is clear is that Graves' lien was recorded prior to Appellees' mortgage.

> must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained. American Cedar and Lumber Co. v Gustin, 236 Mich 351, 360-361; 210 NW2d 300 (1926) (citations omitted) (emphasis added).

The argument by Appellees and MLTA that the identity of Eileen Graves as a land contract vendee or a party with a potential interest in the property was not readily ascertainable to Appellees defies logic and common sense. Appellees were knowingly paying off an unrecorded land contract. Even a modestly prudent lender would obtain a copy of the land contract from its mortgagor or from the land contract vendors. To the extent Appellees chose to simply rely upon a payoff letter from the Giordanos, their decision and the consequences of that decision are their own. Since a prudent lender knows that encumbrances may have attached to the property since the execution of the land contract, the obvious course of action is to search the title records under both the vendor (Giordanos) and vendee (at a minimum, Diaz). As the recorded lien of Graves contained a proper legal description of the property as well as her identity and that of Diaz, the lien is recorded in both the tract and **grantor-grantee index**. Thus, the lack of recording of the land contract does not prevent Appellees from possessing sufficient knowledge to readily discover Graves' lien in the grantor-grantee index, whether same is found in the Giordanos' chain of title or not.

Appellees rely heavily upon the Owner's Affidavit received from Steve Diaz on September 13, 1994. Appellees acknowledge that Diaz failed to disclose the lien in favor of Graves. Appellees also recognize that this failure of disclosure constitutes actionable fraud. (Def.-App. Brief, p. 46). As such, due to the fact that their reliance and inquiry was limited to this Owner's Affidavit, their remedy is against its author, Steve Diaz. Appellees should not be allowed to leap frog over their remedy against Steve Diaz to take away the valid lien rights of Eileen Graves.

V. APPELLEES MAY NOT SEARCH THE GRANTOR-GRANTEE INDEX ONLY.

MLTA states that documents contained in a tract index do not provide constructive notice to a subsequent purchaser and cites to John Widdicomb Co. v Card 218 Mich 72; 187 NW 308 (1922) for the proposition that a purchaser need only "inspect the index book which the register of deeds is required by law to keep and does keep." However, while these words are found in the noted opinion, they are taken out of context. Nowhere in the opinion does the Court attempt to suggest that the grantor-grantee index should be searched to the exclusion of the tract index. Rather, the opinion speaks to the reasonable diligence required of subsequent purchasers to search the records related to that property kept by the register of deeds. *Id.* at 75-76.

The repeated use of the word "official" to describe the grantor-grantee index to the exclusion of the tract index by Appellees and MLTA is misleading. MLTA cites to Thomas v Board of Supervisors of Wayne County, 214 Mich 72; 182 NW 417 (1921), but fails to provide the context of the Court's comments concerning the tract and grantor-grantee indices. The Thomas Court described the historical development of the tract and grantor-grantee indices and noted that the tract index was authorized by the state legislature in 1841 prior to the mandated grantor-grantee index in 1846. *Id.* at 77-81. The Thomas Court noted that the tract index is a superior system of indexing interests in property and that the subsequent grantor-grantee index was not intended to repeal the statute authorizing the tract index, but was merely enacted as the legislature became aware that not all counties were maintaining a tract index. *Id.* While the Court did state that tract indices are a matter of "local concern", it did not make such statement in the context suggested by MLTA that the grantor-grantee index is the only "official" recording system. Rather, the "local concern" reference was made to a challenge by Wayne County residents to the cost incurred by the county for creating a separate bureaucratic "Tract Department." *Id.* Most glaringly, what the MLTA fails to present is

the Thomas Court's plain statement that "the tract index as prepared is a public record." *Id.* at 83. Thus, the MLTA's repeated rumblings about the "official" index are for naught.[6] The tract index is public record and the Appellees are charged with notice of its contents. MLTA's global concern over the lack of uniformity of all Michigan counties regarding tract indices need not be addressed by this Court. Oakland County maintains a tract index and this is an Oakland County case.

In American Federal Saving & Loan Assoc. v Orenstein, 81 Mich App 249; 265 NW2d 11 (1978), the Court of Appeals summed it up nicely:

> It is the duty of a purchaser of real estate to investigate the title of his vendor, and to take notice of any adverse rights or equities of third persons which he has the means of discovering, and as to which he is put on inquiry. . . .The questions in such cases are: First, whether the facts were sufficient to put the party on inquiry; and, Second, did he fail to exercise due diligence in making the inquiry?
> *Id.* at 252 (citations omitted).

VI. APPELLEES ARE NOT ENTITLED TO THE REMEDY OF EQUITABLE SUBROGATION.

Appellees' own brief clearly demonstrates the inapplicability of the doctrine of equitable subrogation to their claim. As Appellees themselves describe:

> The doctrine of subrogation rests upon the equitable principle that one who, in order **to protect a security held by him, is compelled to pay a debt** for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect. Stroh v O'Hearn, 176 Mich 164, 177; 142 NW 865 (1913) (Def.-App. Brief, p. 43)(emphasis added).

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[6] MLTA's attack on the analysis of Schepke v Dept. of Nat. Resources, 186 Mich App 532; 464 NW2d 713 (1990) and Cipriano v Tocco, 772 F Supp 344 (ED Mich 1991) is also clouded by its own failure to acknowledge the tract index's status as a public record. While MLTA and Appellees take piecemeal quotes from cases from the 1800s and early 20th Century, Schepke and Cipriano comprehend the more modern and natural trend in real estate conveyances. Both cases simply acknowledge the point that it is no burden to require a party to search the tract index for the title history to a parcel of property.

In this instance, Appellees do not even meet the criteria of the case they cite. Appellees held no "security" which "compelled" them to pay a debt of Diaz. Rather, they are mere volunteers who came into this transaction seeking a profit. As mere volunteers, Appellees are barred from even entering the arena of equitable subrogation to argue for its application. Hartford Accident Indemnity Co. v The Used Car Factory, 461 Mich 210; 600 NW2d 630 (1999).

Appellees state that their argument concerning the application of equitable subrogation was raised at the trial court, "but the issue was not addressed in its opinion" (Def.-App. Brief, p. 39). In granting Graves' motion and denying Appellees' motion, the trial court necessarily considered and rejected Appellees' argument for the application of the doctrine of equitable subrogation. Graves urges this Court to do likewise.

CONCLUSION

Eileen Graves has met her burden and legal obligation under Michigan law as it relates to her judgment lien. Her lien was recorded with the Oakland County Register of Deeds on September 7, 1994, prior to recording of the mortgage of Appellees. Under the plain language of the statute, her interest has priority. The equitable arguments as to subrogation of interests and purchase money mortgages are not applicable in this instance as the public policy supporting each are not found in the facts of this case.

Any quarrel with the timeliness or manner in which Graves' lien was "indexed" is one for the legislature to remedy. If counties are not maintaining their indices in accordance with Michigan law, parties who properly record their documents should not be made to suffer, as was determined by the Court of Appeals in Central Ceiling, *supra*. The preface "official" to the chain of title found in the grantor-grantee index is simply a misnomer. The tract index is as much a public record as the grantor-grantee index. The persistent arguments of Appellees and MLTA cannot change that simple

fact. In the end, the only reasonable conclusion to be drawn from the facts of this case is that Eileen Graves recorded her judgment lien in compliance with Michigan law and is entitled to be protected thereby.

RELIEF REQUESTED

Plaintiff Appellant Eileen V. Graves respectfully requests that this Honorable Court reverse the decision of the Court of Appeals and remand to the trial court for entry of Judgment.

Respectfully submitted,

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